STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL J. WASHINGTON,

Defendant-Appellant.

UNPUBLISHED
January 24, 2003

No. 234926
Wayne Circuit Court
LC No. 00-008655

Before: White, P.J., and Kelly and Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to the mandatory two years' imprisonment. We affirm.

I. Basic Facts

Leroy Terrell and Antoinette Webb,[2] although residing together as a married couple, had filed for divorce approximately thirty-nine days before the incident giving rise to defendant's convictions. Webb had previously sought a personal protection order against Terrell after he allegedly threatened to beat her to death. According to Webb, they continued to live in the same house because Terrell would not leave. Webb occasionally spoke to defendant about Terrell's abuse. Two weeks before the shooting, Terrell gave Webb a black eye. Webb told family members about this incident.

On the evening of July 8, 2000, Terrell and Webb had several family members, including defendant, visiting their home. Terrell and Webb argued after which Terrell retreated to an upstairs bedroom. Defendant followed Terrell upstairs and confronted him about abusing Webb. Defendant said, "I told you about f—king with my sister." Defendant also approached Terrell making a fist and stating that he would show him how it felt to have a bigger person beat on him. According to defendant, Terrell pulled out a handgun and began shooting at defendant. In

[1] Defendant was charged with open murder, MCL 750.316 and felony-firearm.
[2] Defendant, Webb's brother, lives in Ohio with his wife and children.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

response, defendant dropped to the floor, removed his own gun from his waistband, and shot twice at Terrell. Eugene Smith testified that he heard defendant shout, "Leroy, why you trying to kill me." Defendant ran downstairs and outside shouting, "He [sic] trying to kill us, get everybody out of the house." After a moment or two passed, defendant asked his cousin, Eugene Smith, whether Terrell had been shot. Smith responded that he had. Defendant then asked where Terrell had been shot. Smith responded that Terrell had been shot in the chest. Webb, accompanied by Smith and defendant, drove Terrell to the hospital after a call to 9-1-1 did not result in a prompt response.[3]

Defendant proceeded from the hospital to his mother's house where he called the police. When police officers arrived at defendant's mother's house, defendant responded to the officers' questions about his identity and produced identification. Defendant gave a statement to police officer Barbara Simon who wrote the statement as follows:

> I went over to [Webb's] house to confront [Terrell] about jumping on my sister. I went over there to beat him . . . after I got upstairs, I told [Terrell] how I felt. . . . I had my gun on me. I had a nine millimeter [sic]. After I told him how I felt, I told him now I'm going to show you how it feel to jump on someone bigger than you. I started walking toward [him]. [He] said f—k that. [He] was sitting on the bed. I started toward him he pulled out a gun, and I pulled out my gun and we started shooting.

The statement also indicated that defendant came from Ohio "to jump on [Terrell]" for the way he treated Webb. However, at trial, defendant denied that he had come to Detroit for the purpose of confronting or beating Terrell. He testified that he came to Detroit "To vacation a little bit," and to visit his mother and sister.

II. Felony-Firearm Instruction

Defendant first argues that the trial court erred in its felony-firearm instruction to the jury because it denied defendant his constitutional right to present a defense. We disagree.

To preserve this issue, a defendant must object to the instruction before the jury deliberates. MCR 2.515(C). Because defendant did not preserve this alleged error, our review is limited to whether there was a plain error that resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Knapp,* 244 Mich App 361, 375; 624 NW2d 227 (2001), citing *People v Carines,* 460 Mich 750, 766-767; 597 NW2d 130 (1999). This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Aldrich,* 246 Mich App 101, 124; 631 NW2d 67 (2001). We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

At trial, defendant claimed that he acted in self-defense. "In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably

[3] Terrell died of multiple gunshot wounds. There was no evidence of close range firing. There was also evidence that two weapons were fired at the scene.

believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

On appeal, defendant argues that the trial court's instruction on felony-firearm denied defendant of his defense because it was inconsistent with the self-defense instruction. Defendant does not dispute that the jury was instructed on self-defense and does not argue that the instruction itself was inaccurate. The trial court instructed on felony-firearm as follows:

> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt: first, that the defendant committed the crime of murder, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime; second, that at the time the defendant committed the crime, he knowingly carried or possessed a firearm.

After some deliberation, the jury sent out a note stating, "If self-defense, can we find that there is guilty [sic] of possession of a firearm at the time of commission or attempted commission of a felony." In response, the trial court re-read the same felony-firearm instruction, without objection from either side.

On appeal, defendant argues that the felony-firearm instruction was improper because it led the jury to believe that they could convict defendant of felony-firearm even if they found defendant acted in self-defense as to the murder charge. We disagree. The instructions clearly advised the jury that in order to convict of felony-firearm, it had to find that defendant committed the crime of murder. Further, the jury was instructed that "if a person acts in lawful self-defense, his actions are excused and he is not guilty of any crime." Defendant argues that the felony-firearm instruction as given authorized a logically inconsistent verdict. However, a jury in a criminal case may reach different conclusions concerning an identical element of two different offenses. *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). Juries are not held to any rules of logic. For example, juries have the power to acquit as a matter of leniency. *People v Lewis*, 415 Mich 443, 449; 330 NW2d 16 (1982). More specifically, a jury may decide to acquit a defendant of an underlying offense even though it believes beyond a reasonable doubt that he was guilty of that offense; the jury may decide instead to extend mercy by convicting defendant of only what the jury considered to be a lesser offense. *Id.* at 451. We cannot conclude, as defendant argues, that the challenged instruction informed the jurors they could ignore the trial court's other instructions. Rather, the instruction informed the jury to consider the felony-firearm charge separately from the underlying felony charge, but incorporated the underlying charge within its instruction. We find no error in this instruction.

To the extent that defendant argues that the instruction as given misled the jury to believe that it could not consider self-defense in deciding whether defendant had committed murder as an element of felony-firearm, we do not find that the jury's verdict necessarily leads to this conclusion. The fairness of a jury charge cannot be assessed in a purely mechanical manner. *People v Butler*, 413 Mich 377, 388; 319 NW2d 540 (1982). A jury can reach inconsistent verdicts. *Lewis, supra* at 449. Because the instructions as given fairly presented the issues to be tried and sufficiently protected defendant's rights, we find no error.

III. Felony-Firearm Conviction

Defendant also argues that there was insufficient evidence to support his conviction of felony-firearm. We disagree.

In reviewing a claim of insufficient evidence, we consider the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds, 441 Mich 1201 (1992).

At trial, defendant admitted that he used a handgun to shoot Terrell. The evidence also clearly demonstrated that Terrell died as a result of defendant's shots. Therefore, defendant's argument is not that there was insufficient evidence to support a finding that he used a handgun, but rather, that if the jury found that defendant did not commit the underlying felony, it could only have been because they found defendant acted in self-defense which is inconsistent with the verdict finding defendant guilty of felony-firearm. Thus, defendant essentially argues that in order to be found guilty of felony-firearm, it must first by determined by the trier of fact that he was guilty of the underlying felony. In other words, defendant argues that if the jury found that self-defense applied to the underlying felony, it should also have found that it applied to felony-firearm.

The felony-firearm statute reads as follows:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. [MCL 750.227b; *People v Miles*, 454 Mich 90, 99; 559 NW2d 299 (1997).]

Conviction of the underlying felony is not an element of felony-firearm. *Lewis*, *supra* at 455. It is also well settled that a jury is not required to reach consistent verdicts with regard to a felony-firearm charge and the underlying felony. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000), citing *Lewis*, *supra*. Therefore, we find there was sufficient evidence to support defendant's conviction.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs